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No. 878

IN THE

United States Court of Appeals

FIFTH CIRCUIT.

No. 16,425.

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant*,

vs.

MRS. WOODROW SAPP, MRS. JAMES H. TYRE and MRS. LEROY BECKHAM, SR., *Appellees*

PETITION FOR REHEARING

U. S. COURT OF APPEALS
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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16425

ATLANTIC COAST LINE RAILROAD CO., *Appellant*

v.

MRS. WOODROW SAPP, MRS. JAMES H. TYRE, MRS. LEROY BECKHAM, SR., *Appellees*

PETITION FOR REHEARING BY APPELLEES

To The Honorable, The Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

COME NOW, Appellees in the above-entitled cause and respectfully ask for a rehearing in these three cases upon the following grounds, to wit:

Appellees, with the very greatest respect, but, also, with the most sincere conviction as to the soundness of their position, contend that this Court in reversing and rendering judgment against them, overlooked the following facts, to wit:

1. The evidence in these cases presented an issue for the jury. Trial by jury is guaranteed under the Seventh Amendment to the Constitution of the United States. It

was error for this Court to usurp the province of the jury in these cases.

The Court states (p. 8 of Opinion) that Appellees adduced some evidence in support of the various acts of negligence "particularized" by Appellees against Appellant.

Appellant put up no evidence whatever.

In this situation, this Court overlooked the fact that it was for the jury to decide whether or not Appellees' evidence was sufficient to carry the burden of proof.

2. The Court overlooked the fact that even without the benefit of the prima facie statute, Appellees' evidence was sufficient to carry these cases to the jury under the law of Georgia as interpreted by this Court and by Georgia Courts in numerous decisions.

3. The Court overlooked the fact that under Georgia law the testimony adduced by Appellees with respect to the inherently dangerous nature of this crossing, with respect to weather conditions existing on the night of the accident, and with respect to the practical invisibility at night of the particular type of freight cars making up the train in question, imposed upon Appellant the duty of giving some warning to motorists of the presence of the train at this dangerous crossing, in addition to that afforded by the train itself. See *A.C.L.* v. *Kammerer*, 239 F. 2nd 115 and the numerous cases cited therein.

4. In holding that the Georgia prima facie rule did not apply because "the evidence introduced by Appellees rebutted the only charge of negligence upon which they relied," the Court overlooked the fact that the complaints set out 13 charges of negligence against Appellant (R. 14), and that only one of these charges (the one with respect to the X sign) was rebutted by Appellees' evidence.

The Court also overlooked the fact that there was no evidence whatever which rebutted the principal charge of negligence upon which Appellees relied, namely, that because of the inherently dangerous nature of this crossing at which many accidents had occurred and because of the practical invisibility at night of the particular type of cars which were moved over this track, the railroad, instead of installing expensive blinker lights at this rarely used crossing, had adopted the expedient of having the engineer and the fireman throw out fuses on the highway on each side of the crossing at night to warn motorists of the presence of the train across the highway; that the traveling public had become accustomed to rely upon these fuses and were entitled to rely upon them; that fuses were not thrown out on the night in question or, if they were, they had burned out before the 83rd car reached the crossing, and that this negligence on the part on the railroad was the approximate cause of the collision.

All of the evidence introduced tended to support this principal ground of negligence relied upon by Appellees and none of the evidence introduced rebutted it in any way.

5. This Court, in holding that the prima facie statute did not apply because Appellees "particularized" the grounds of negligence in their complaints and because some evidence was introduced in support of some of the grounds of negligence, overlooked the fact that no such interpretation as this has ever been put upon this statute, to our knowledge, either by Georgia Courts or by any other Court.

6. In holding that it was encumbent upon appellees to prove directly that it was impossible for the occupants of the automobile to see the train at the time the automobile approached the crossing, this Court overlooked the fact that all of the occupants of the automobile were instantly killed at the crossing and, therefore, could not

appear as witnesses. On the other hand, the occupants of the train were not injured. That is the usual situation in cases of this kind and that is the reason for the Georgia prima facie rule. Ga. Code 94-118.

7. The Court overlooked the fact that the only persons in life, who could testify as to visibility down the highway being travelled by the automobile at the time the train reached the crossing, were the members of the train crew, whose evidence was not produced by the railroad, as required by Georgia law. Ga. Code 38-119.

8. In referring to the testimony of the witness Rozier as proof that the driver of the automobile could have seen the train at a distance of 150 feet, the Court overlooked the following facts:

(a) Rozier was sitting off the highway and on the opposite side of the crossing from the automobile.

(b) He had the benefit of a very bright neon light burning over the building in which he was sitting; whereas this light shone in the eyes of the occupants of the car as they approached the crossing.

(c) Even with the aid of the light, Rozier, who had heard the train whistle and was looking for it, could not see the train plainly.

9. In giving probative value to the testimony of the undertaker about visibility at the crossing when he arrived there sometime after the accident, the court overlooked the fact that the crossing was lighted up by that time when the bodies and wreckage were being removed from the crossing; also, the fact that the fog was spotty, being very dense at some times and places and not so dense at others, as testified to by all the witnesses. These observations apply also to the references by the Court to the testimony of the witnesses Moody, Doran and Shell, relating to the fog.

10. In holding (p. 5 of Opinion) "that no warning need be given to a person of prudence of an object plainly visible within the range of the statutory headlight requirements" and (p. 6) that "to establish liability it was necessary for appellees to prove that the fog was of such density that it impaired the automobile driver's visibility to such an extent that he in the exercise of ordinary care for his own safety could not have seen the train on the crossing in sufficient time to avoid striking it", the Court overlooked the following facts:

(a) The most recent decisions by this Court and by the Georgia courts are precisely to the contrary of the above quoted holdings in the cases sub judice.

(b) Each of the three complaints alleged that the railroad was negligent in not giving additional warning because of the invisibility of the train on the crossing to motorists approaching the crossing from the south, at the time of the collision.

Not one single witness testified as to the visibility of the train to motorists approaching from the south either at the time, or near the time, of the collision.

Visibility from the north was an entirely different thing than visibility to motorists from the south, because of the large neon sign.

This ground of negligence was therefore not negatived by any witness and it was encumbent upon the railroad under Georgia law to come forward with its evidence in order to avoid the impact of the prima facie rule.

11. In holding that appellees lost the benefit of the prima facie rule by "particularizing" various acts of negligence on the part of the railroad company "and having adduced some evidence in support thereof, the case then stood as to burden of proof no differently from a case against a non-railroad defendant", this Court

overlooked the fact that under the well known *Erie* v. *Tompkins* rule, the Court is bound by the interpretation of Georgia statutes made by Georgia courts. No Georgia court, to our knowledge, has ever given this interpretation to the statute embodied in Georgia Code Section 94-1108.

On the contrary, Georgia courts have held, without exception, to our knowledge, that the statute requires the railroad to come forward with some evidence to rebut each act of negligence "particularized" by the plaintiff.

To hold that because the plaintiff adduces some evidence in support of some of the grounds of negligence "particularized", he thereby forfeits the benefit of the statute as to each of those grounds and as to every other group of negligence charged, is simply new law, we most respectfully submit, insofar as Georgia is concerned.

No Georgia court has ever so held, to our knowledge, and the Court cites no authority, Georgia or otherwise, for its holding.

To the best of our knowldege, the applicant railroad has taken no such position in the case sub judice.

12. In holding (Opinion, p. 8) that "the inference of the railroad's negligence was at an end when the evidence introduced by appellees rebutted the **only** charge of negligence upon which they relied", this Court inadvertently overlooked the following facts:

(a) Appellees relied upon **every** act of negligence set out in the complaints, as amended.

(b) The final enumeration of the grounds of negligence relied upon by appellees is to be found on pages 14, 15, 16, 17, 18 and 19 of the record. Amendment filed March 2, 1956.

Thirteen grounds of negligence were set out in this amendment.

The only one of these thirteen grounds of negligence which was "negatived" by appellees' evidence was ground (h) with respect to the "X" sign.

The principal grounds of negligence relied upon by appellees are to be found in sub-paragraphs (i), (j), (k), (l) and (m) (R. pp. 16, 17, 18, 19).

No evidence was adduced by the railroad to refute any of these grounds of negligence and none of them was negatived by any evidence of Appellees.

In the light of these indisputable facts, we ask, with the utmost respect, how can this Court say that Appellees relied upon only one charge of negligence and that it was rebutted by Appellees' evidence?

13. This Court, in discrediting the testimony of the witness Rozier (Opinion, p. 6) with respect to the custom and rule of the railroad to throw fuses on the highway at this particular crossing to warn motorists when the crossing was occupied by a train, overlooked the following facts:

(a) The Court, in holding that the fuses seen by Rozier may have been put out as a warning to "following" trains, overlooked the fact that common sense dictates that fuses thrown out for this purpose would not be thrown on a public highway.

(b) The Court, in holding that the fuses seen by Rozier may have been used in "switching" operations overlooked the fact that the pictures introduced in evidence show that the railroad at this point is a single track upon which it would have been impossible to carry out "switching" operations.

(c) The Court, in holding that the fuses seen by Rozier may have been put out by "standing" trains, overlooked

the fact that under this Court's own very recent (4/12/57) decision in the *Watkins Case* (243 Fed. 2d 171) the railroad's duty with respect to moving trains is the same as with respect to standing trains.

(d) The Court overlooked the fact that under our law it is for the jury, and not the Court, to evaluate testimony of this kind.

(e) The Court overlooked the fact that it would have been a very simple matter for the railroad to have produced evidence as to what its purpose was in throwing fuses on the highway at this crossing, instead of leaving the matter to conjecture by the jury and by this Court. **That the railroad's failure to do so should be condoned by this Court, instead of condemned, is one of the several mysteries in the Court's decision in these cases.**

14. One of the charges of negligence made by the Appellees in these cases (R. 16 sub-paragraph i) was that because of the notoriously dangerous nature of this crossing at night, in any and all conditions of weather, the railroad had promulgated a rule requiring its train crews to throw fuses upon the highway; that motorists had come to rely upon these fuses to warn them when the highway was blocked by a train at night; that the crew failed to throw out a fuse on the night in question or that if they did so the fuse was not burning when the 83rd car crossed the highway.

It is elementary that violation of a company safety rule is evidence of negligence.

It is also elementary, and common sense, that when a railroad decides that a crossing is so dangerous as to require gates, blinker lights, fuses or the like; then installs one or more of these devices; then the device fails to operate, after motorists have come to depend upon it, and injury results, the railroad is liable, even though it may not have been liable in a given case if it had not lulled the motorist into reliance upon the safety device.

In holding in these cases that Appellees' evidence negatived every charge of negligence, this Court completely overlooked this charge of negligence.

Knowing that the sworn testimony of the train crew at the Coroner's inquest sustained this charge of negligence, Appellees did not prepare to prove it conclusively by their own witnesses, since they knew that under Georgia law the railroad would have to put in the evidence of the members of the train crew.

The railroad took a chance and did not do so, because it knew that the verdicts would be much larger if it did.

We respectfully submit that this Court, in its impartial administration of justice should not reward the railroad for its strategy by giving it judgment.

15. This Court, in holding that these cases should be reversed and judgment rendered for defendant in spite of the jury verdict, overlooked the fact that this Court itself states (Opinion, p. 8) that Appellees "adduced some evidence in support" of the various acts of negligence Appellees "particularized".

In other words, this Court holds that although Appellees adduced some evidence in support of their charges of negligence and although defendant introduced no evidence whatever as to negligence by decedants, or as to care by defendant, nevertheless, justice under law requires that judgment be rendered for the railroad.

We respectfully submit that this Court momentarily and inadvertently confused the respective provinces of courts and juries under Anglo-Saxon jurisprudence.

16. In holding that Georgia Code Section 38-119 does not apply to the failure of the railroad to put in the evidence of the train crew because the railroad subpoenaed the members of the train crew and they appeared in court on the day the case was called and could have

been sworn as witnesses by Appellees, the Court overlooked the following facts:

(a) This Code Section requires that the EVIDENCE must be produced.

(b) Having called these witnesses and sworn them on the first day of trial as potential witnesses for the defendant, plaintiffs had the right to assume, particularly in view of the prima facie statute, that their evidence would be introduced. It was not until after plaintiffs had closed their case that the railroad announced that it would offer no testimony. It was then too late for plaintiffs to call them as their own witnesses, even if they thought it necessary to do so.

(c) In important cases of this kind involving the deaths of three young men, the railroad should be required to put in the evidence of the train crew and this Court should certainly do no more than remand the cases for a new trial to determine what the evidence of the train crew is with respect to the grounds of negligence alleged against appellant.

WHEREFORE, for the reason stated, Petitions respectfully urge that the decision of the Court be revoked and the judgment below affirmed or, in the alternate, that a rehearing be granted Petitioners.

Respectfully submitted,

E. WAY HIGHSMITH,
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J. P. MOZINGO, III,
Darlington, South Carolina,

J. H. HIGHSMITH,
Baxley, Georgia,

W. L. MCGOVERN,
Washington, D. C.

Attorneys for Petitioners.

We, the undersigned, attorneys for Appellees in the above-stated case, hereby certify that the foregoing petition for rehearing is not interposed for delay, and that in our judgment it is well founded and should be granted by this Honorable Court. This November 29, 1957.

E. Way Highsmith
J. P. Mozingo, III
J. H. Highsmith
W. L. McGovern

Certificate of Service

I hereby certify that I have this day mailed a copy of the foregoing petition to Honorable Larry E. Pedrick, Sr., Attorney at Law, Waycross, Georgia, and to Honorable L. J. Bennet, Attorney at Law, Brunswick, Georgia, Attorneys of Record for Appellant. This November 29, 1957.

W. L. McGovern
Attorney for Appellees.